IN THE COURT OF APPEALS 02/27/96

OF THE

STATE OF MISSISSIPPI

NO. 95-CA-00599 COA

JASON N. REED, BY AND THROUGH BELINDA C. STEWART, NEXT FRIEND; AND BELINDA STEWART

APPELLANTS

v.

CHARLES ROGERS AND JANICE ROGERS

APPELLEES

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. JOHN S. GRANT, III

COURT FROM WHICH APPEALED: RANKIN COUNTY CHANCERY COURT

ATTORNEY FOR APPELLANT:

ORBIE S. CRAFT

ATTORNEY FOR APPELLEE:

LAURIE R. WILLIAMS

ALAN C. GOODMAN

NATURE OF THE CASE: TORT: ANIMAL BITE

TRIAL COURT DISPOSITION: SUMMARY JUDGMENT GRANTED TO DEFENDANT

BEFORE FRAISER, C.J., BARBER, DIAZ, AND SOUTHWICK, JJ.

SOUTHWICK, J., FOR THE COURT:

The Rankin County Chancery Court granted summary judgment to dog owners in a lawsuit against them stemming from a dog bite. We affirm.

FACTS

In August, 1994, Jason Reed was playing baseball in Pearl with neighborhood friends when a ball landed in the fenced yard of Charles and Janice Rogers. The Rogers kept their dog, Jacoby,

penned in that yard. Jason climbed the fence and successfully retrieved the ball. However, he failed to make his escape from the yard without first being bitten by the dog.

Through Belinda Stewart, Jason filed suit against the Rogers which Belinda joined. Specifically, he alleged that the Rogers were strictly liable for Jason's injuries because of purported violations of city ordinances.

DISCUSSION

The trial court held that since the dog had not previously bitten anyone, the Rogers were not liable. Jason argues that the trial court misapprehended his cause of action as being one of "simple" negligence. He contends that his claim is founded in negligence *per se* and that the sole question for the trial court should have been whether the Rogers violated city ordinances and, if so, whether the violations proximately cause his injuries. We agree that this is the appropriate analysis. However, we disagree that it was not employed by the trial court. On the contrary, the court correctly examined the case under the appropriate theory of recovery.

The City of Pearl has enacted several ordinances cited by Jason as being applicable to his case and providing a source of liability. We consider each.

One ordinance provides:

> It shall be unlawful for any person to . . . keep . . . on their premises any . . . enclosure . . . for keeping of animals . . . so as to become a public nuisance to persons residing in the vicinity thereof, nor shall they be . . . kept in any manner so as to cause bodily injury to any person residing in the vicinity of the . . . enclosure . . . .

Pearl, Miss., Ordinances, *Animals & Fowl* § 4-2(6) (1994). At first blush, the intent of this provision is not entirely clear. Jason has not presented authority supporting his view that the ordinance proscribes *animals* from becoming nuisances or the source of injury. However, the interpretation made by the trial judge is more reasonable and consistent with the ordinance's language. The

provision prohibits maintaining pens or enclosures in such a manner that *the pens or enclosures* constitute a nuisance or create a risk of injury.

In support of his construction, Jason solely relies upon *Chamberlain v. Lindsey*, 163 Miss. 183 (1932). In *Chamberlain*, the supreme court considered a case in which a child was injured by a

runaway horse. *Chamberlain v. Lindsey*, 163 Miss. 183, 185 139 So. 812 (1932). A local ordinance proscribed allowing horses to run loose. *Chamberlain,* 163 Miss. at 185. In accepting negligence *per se* as a theory of recovery, the court considered whether the child was in a class of persons intended to be protected by the ordinance and whether the hazard was of a nature intended to be prevented by the provision. *Id.* at 186; *see Palmer v. Anderson Infirmary Benevolent Ass'n*, 656 So. 2d 790, 796 (Miss. 1995) (medical malpractice); *Bryant v. Alpha Entertainment Corp.*, 508 So. 2d 1094, 1096-97 (Miss. 1987); *Cuevas v. Royal D'Iberville Hotel*, 498 So. 2d 346, 348-49 (Miss. 1986) (citations omitted) (holding that for negligence *per se* to apply, harm must be one sought to be prevented by the statute, and injured person must be member of class sought to be protected); *Byrd v. McGill*, 478 So. 2d 302, 304-05 (Miss. 1985) (boating accident); *Haver v. Hinson*, 385 So. 2d 605, 608 (Miss. 1980) (citation omitted) (automobile accident); *Munford, Inc. v. Peterson*, 368 So. 2d 213, 217 (Miss. 1979) (automobile accident involving alcohol). In *Lindsey*, the ordinance expressly related to runaway horses—not their pens. *Lindsey*, 163 Miss. at 185. From a common sense reading, the ordinance in this case makes no express application to any danger posed by animals alone. Here, the trial court correctly concluded that the ordinance did not address the hazard presented by animals but, instead, the hazard created by dangerous pens or enclosures.

The ordinances also provide:

> It shall be unlawful for any person to keep or maintain within the City of Pearl, Mississippi any vicious . . . animal . . . .

Pearl, Miss., Ordinances, *Animals & Fowl* § 4-2(6) (1994). The ordinances explain that a vicious animal is "any animal that constitute[s] a physical threat to human beings . . . ." *Id.* §§ 4-1(k), 4-7(c). Notably, the ordinances do not explain how to assess whether an animal poses a threat. Accordingly, as the trial judge did, it is appropriate to examine "simple" negligence law to answer this question.

In order to rely on negligence *per se*, "there must be a showing . . . that the statute was indeed violated." *Cannon v. Jones*, 377 So. 2d 1055, 1058 (Miss. 1979) (citation omitted) (airplane accident). In instances in which the statute prescribes a general course of conduct, such as "keeping a lookout," the supreme court has examined the facts of the case to determine whether the party has "reasonably" complied with the prescription. *Id.* In other words, the court has injected considerations of "simple" negligence into the preliminary analysis of whether an individual was *per se* negligent. Such a mode of analysis is applicable here, where the city has essentially prescribed a general course of conduct, i.e., an individual is obliged to act with reasonable care to prevent his pet or livestock from posing a threat.

The Rogers have done so. Their dog was confined to a fenced yard. He apparently had never shown any indication of violent propensities. Accordingly, there was no threat for the Rogers to obviate. In sum, they complied with the ordinance.

It is textbook law that under "simple" negligence a person bitten by another's dog may recover in tort only if he demonstrates that the dog had a propensity to bite and that the owner knew of that propensity. *Poy v. Grayson*, 273 So. 2d 491, 494 (Miss. 1973). Jason acknowledges this. He argues, however, that the ordinance in question cannot be supplemented by reliance upon common law to inform the term "threat" used in the ordinance. Instead, Jason essentially contends that the provision must be liberally construed in his favor. If the City of Pearl had desired to define the term "threat" in

the manner advanced by Jason, it could simply have defined a vicious animal as any animal that causes an injury. However, the ordinance deliberately withdraws from such a sweeping definition relying instead on the undefined word "threat" to draw the boundaries of the proscribed conduct.

We are guided in our interpretation of this ordinance by guideposts laid by the supreme court for statutory interpretation. Statutes must, of course, be liberally read to effectuate sometimes enigmatic legislative intent. *Allred v. Webb*, 641 So. 2d 1218, 1221 (Miss. 1994) (citation omitted). Here, Jason has not presented us with any concrete evidence that the drafters of the city ordinance intended that all dogs be designated as vicious simultaneously and, then, *a priori* vicious with their first bite. Militating against such a view of the ordinance is the instruction that "[a]n unwise purpose will not be imputed to the [drafters] when a reasonable construction is possible." *Id.* at 1222 (citations omitted). In our view, subjecting animal owners to automatic liability because of their ownership of previously docile pets or livestock is unreasonable in view of the ability of an owner to

protect against any threat posed by his animals *once he is conscious of that threat.* This is consistent with the common law "one-bite rule."

Our examination of the ordinance has revealed that its purpose is largely to protect the general public from demonstrably vicious animals *that have gotten loose*. The destruction of vicious animals is permitted by the ordinance when, among other things, the animal is running at large. Pearl, Miss., Ordinance, *Animals & Fowl* § 4-12.2(a)(1) (1994). Thus, it may be inferred that the keeping of vicious animals is proscribed because such animals run the risk of getting loose and harming the general public—not because such animals pose a threat to trespassers. Consequently, it makes sense that an animal owner ought to be afforded the opportunity to dispose of his animal *once he discovers its vicious nature*. To hold otherwise, as Jason suggests we do, would result in all animal owners having to dispose of their pets or livestock for fear that they might some day cause injury.

Jason also advances an ordinance mandating the immunization of dogs against rabies as an additional source of liability under the theory of negligence *per se*. Pearl, Miss., Ordinances, *Animals & Fowl* § 4-3(a) (1994). Jason urges that he suffered emotional distress because of the uncertainty created by the absence of an immunization. He argues that he is entitled to recover because he was afraid that he might have been exposed to rabies. We find this position to be untenable.

There was no evidence to indicate that the dog in this case had rabies or that the failure to obtain the immunization caused any physical injury to Jason. Jason argues that his emotional damages are sufficient to permit recovery. His claim is one akin to negligent infliction of emotional distress. Because the Rogers were negligent in their conduct, Jason contends that he suffered emotional damages. However, to sustain a claim for emotional distress, the asserted negligence must have resulted in a medically cognizable condition. *Leaf River Forest Prods. v. Ferguson,* 662 So. 2d 648,

658 (Miss. 1995) (citations omitted). Mississippi has rejected the availability of a claim based on mere fear of illness absent "substantial proof of exposure and medical evidence that would indicate possible future illness." *Ferguson*, 662 So. 2d at 658. There is no such proof here. Accordingly, the trial judge correctly found in the Rogers' favor.

THE JUDGMENT OF THE RANKIN COUNTY CHANCERY COURT IS AFFIRMED AND ALL COSTS OF THIS APPEAL ARE TAXED TO THE APPELLANTS.

FRAISER, C.J., AND THOMAS, P.J., BARBER, COLEMAN, DIAZ, KING, AND McMILLIN, JJ., CONCUR.

BRIDGES, P.J., AND PAYNE, J., NOT PARTICIPATING.